Albertson's, Incorporated *and* Robert Richardson *and* Oren W. Sparks *and* United Food & Commercial Workers Local 7. Cases 27–CA–11291, 27–CA–11611, 27–CA–11614, 27–CA–11742, and 27–CA–11925

March 31, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On November 6, 1992, Administrative Law Judge George Christensen issued the attached decision. The Charging Party Union filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Albertson's, Incorporated, Colorado Springs, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] In adopting the judge's finding that the Respondent did not violate Sec. 8(a)(5) of the Act by excluding its bakery managers from the coverage of the 1990–1993 collective-bargaining agreements, we do not rely on the judge's discussion of his ''difficulties'' with the General Counsel's theory of the case. Thus, we do not rely on the judge's queries as to why the General Counsel took the position that the Respondent should bargain for the 14 bakery managers at the front range stores, but not as to the managers at other stores. Rather, we agree with the judge, for the reasons he cited, that the Respondent took the unequivocal position—and, indeed, a legally correct position—from 1989 onwards that the bakery managers were statutory supervisors and had excluded them from the contract's coverage.

We also agree with the judge that Ed Hardy was an agent of the Union notwithstanding the Union's February 16, 1990 letter to the Respondent asserting that Charles Mercer was the only person with the authority to bargain for the Union or bind it to an agreement. All Hardy's actions were reviewed by Mercer, and neither Mercer nor Hardy informed the Respondent that Hardy could not act for the Union. Even assuming for argument's sake that Hardy was not an agent of the Union, we note that the result would be the same because Mercer approved all aspects of the 1990–1993 agreements.

Member Devaney finds it unnecessary to pass on the judge's finding that International Representative Ed Hardy was an agent of the Union at the time he tentatively agreed with the Respondent's bargaining representative on the terms of what eventually became the parties' 1990–1993 agreement. It is undisputed that Union President Mercer subsequently agreed to those terms on the Union's behalf, after specifically discussing with the Respondent's representative, among other things, the deletion of the bakery manager classification from the agreement's wage appendix.

Michael J. Belo and *Chet Blue Sky, Esqs.*, for the General Counsel.

Michael B. Schwarzkopf and *Laura Hamblin, Esqs.*, of Boise, Idaho, for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On September 18–20, 1991, I conducted a hearing at Denver, Colorado, to try issues raised by complaints issued in the subject cases and consolidated for hearing and decision by an August 30, 1991 order issued by the Regional Director for Region 27.

Prior to the close of the hearing, Oren W. Sparks, counsel for the General Counsel and counsel for Albertson's, Incorporated (Respondent) reached a settlement resolving the issues raised by the complaint issued in Case 27–CA–11825, and I approved the settlement. A copy of the settlement agreement is attached as Appendix A.

The three Richardson charges were filed with Region 27 on April 23, 1990, and February 20 and May 29, 1991, respectively. The resulting complaints, amendments thereto, and the order consolidating the three cases were issued on April 4, 9, and 30, July 10, and August 30, 1991.

The charge in Case 27–CA–11614 was filed by United Food & Commercial Workers Local 7 (Local 7) on February 22, 1991, a complaint based on that charge issued on April 9, 1991, and the case was consolidated with the others by virtue of the August 30, 1991 order.

The Richardson complaints allege that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by advising Richardson on or about April 4, 1990, that he would not be considered for promotion to a bakery manager position, because he successfully processed a grievance through arbitration against the Respondent; violated Section 8(a)(1) and (3) of the Act by refusing to accord Richardson normal consideration for promotion to a bakery manager position on or about February 11, 1991; and violated Section 8(a)(1), (3), and (4) of the Act by disciplining Richardson on or about April 24, May 23 and 25, and June 1 and 16, 1991, because he filed the charges and gave the Region information concerning their merits in Cases 27–CA–11291 and 27–CA–11611.

The Local 7 complaint alleges the Respondent violated Section 8(a)(1) and (5) of the Act by refusing to include bakery managers within units of the Respondent's employees represented by Local 7, refusing to recognize Local 7 as the exclusive collective-bargaining representative of those bakery managers, refusing to include the classification of bakery manager and provisions concerning the wages, hours, and working conditions of bakery managers in collective-bargaining agreements between the Respondent and Local 7, and effecting unilateral changes in the wages and working conditions of bakery managers following the execution of collective-bargaining agreements between Local 7 and the Respondent in 1990.

The Respondent denied the alleged April 4, 1990 advice was given; denied it refused to consider Richardson for promotion because of his successful grievance processing, contending others were promoted as better qualified; denied it disciplined Richardson because he filed charges with the Re-

gion and gave the Region information in support thereof, contending he was disciplined for cause; and denied violating the Act.

The Respondent denied it violated the Act by its conduct vis-a-vis bakery managers in stores wherein it recognized Local 7 as the exclusive collective-bargaining representative of units of its employees and was party to collective-bargaining agreements covering the wages, hours, and working conditions of its employees within those units, contending its 1990 agreements with Local 7 properly excluded bakery managers from inclusion within the units covered by those agreements, representation by Local 7, and coverage under the agreements.

The issues created by the foregoing are whether:

1. On or about April 4, 1990, the Respondent advised Richardson he would not be considered for promotion to a bakery manager position because of his successful processing of a grievance against the Respondent and, if so, thereby violated Section 8(a)(1) of the Act.

2. On or about February 11, 1991, the Respondent refused to accord Richardson normal consideration for promotion to a bakery manager's position and, if so, thereby violated Section 8(a)(1) and (3) of the Act.

3. On or about April 24, May 23 and 25, and June 1 and 16, 1991, the Respondent disciplined Richardson because he filed charges in Cases 27–CA–11291 and 27–CA–11611 and, if so, thereby violated Section 8(a)(1), (3), and (4) of the Act.

4. The Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Local 7 as the exclusive collective-bargaining representative of bakery managers at stores which employed bakery managers and Local 7 was recognized by the Respondent as the exclusive collective-bargaining representative of employee units and the unit employees were covered by collective-bargaining agreements between the Respondent and Local 7.

Counsel were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Counsel for the General Counsel filed briefs.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs, and research, I enter the following

FINDINGS OF FACT[1]

I. JURISDICTION AND LABOR ORGANIZATION

The pertinent complaints alleged and the Respondent in its answers thereto admitted at all relevant times the Respondent was an employer engaged in commerce in a business affecting commerce and Local 7 was a labor organization within the meaning of the Act. The pertinent complaints also alleged and the Respondent in its answers thereto also admitted at all relevant times Bakery, Confectionery & Tobacco Workers Local 26 (Local 26) was a labor organization within the meaning of Section 2 of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background (The Richardson Cases)*

The Respondent hired Richardson in November 1981 at store 858 in Colorado Springs, Colorado, as a part-time apprentice baker. His wages, hours, and working conditions were governed by a collective-bargaining agreement between Local 26 and the Respondent. The bakery at store 858 was a ''scratch'' bakery at that time.[2] In November 1982, he began to work full time as a baker and in December 1982 he was discharged for alleged poor work performance.

Local 26 filed and processed a grievance through arbitration on Robertson's behalf, contending it was unfair for the Respondent to discharge Richardson because it was unfair of the Respondent to expect journeyman baker performance from him in view of the insufficient training he received.

The arbitrator sustained the grievance and ordered the Respondent to reinstate Robertson and make him whole for lost wages and benefits.

While the grievance was pending final resolution, the Respondent converted the bakery at store 858 to a ''bake-off'' bakery.[3] On issuance of the arbitration decision, the Respondent refused to reinstate Richardson to his former employment at store 858, contending the bakery work force had been reduced to one baker as a result of the conversion, Local 26 had agreed the Respondent could retain whatever baker it wished in the single remaining position, and it chose one of the bakers at the store at the time of the conversion.[4]

Local 26 took the dispute back to the arbitrator for a compliance ruling, contending it had not agreed the Respondent could choose whomever it please to remain on the job at store 858 and Richardson's restored seniority under the award entitled him to reinstatement under the seniority provision of the Local 26-Respondent agreement.

The arbitrator agreed and directed Richardson's reinstatement. He was subsequently reinstated as the sole baker covered by the Local 26-Respondent agreement at store 858 in 1984. Local 26 subsequently prevailed in a second compliance proceeding before the arbitrator over the amount of backpay and fund contributions owed to and on behalf of Richardson.

Richardson remained in the Respondent's employ as the sole baker at store 858 through March 1990 and was unsuccessful in the interim in securing promotion to the position of bakery manager, for which he applied on three separate occasions (in 1987, 1988, and 1989).

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[1] Although every apparent or nonapparent conflict in the evidence has not been specifically resolved below, my findings are based on my examination of the entire record, my observation of the witnesses' demeanor while testifying, and my evaluation of the reliability of their testimony; therefore, any testimony in the record which is inconsistent with my findings is discredited.

[2] In a ''scratch'' bakery, all preparation of the products sold at the store was accomplished by the bakers employed there, from mixing the basic ingredients to applying the final glaze or icing and decoration.

[3] At a ''bake-off'' bakery, preparation of the baked goods sold at the store was prepared off the premises, with the final baking process and decoration accomplished at the store.

[4] The sales functions within the bakery were performed by clerks represented by Local 7.

B. *The Alleged Unlawful Statement and Promotion Refusal*

The Alleged April 4, 1990 Unlawful Statement to Richardson

The applicable complaint alleges the Respondent violated Section 8(a)(1) of the Act on or about April 4, 1990, by Assistant District Bakery Manager Rick Hansen's[5] advising Richardson he would not be considered for promotion to a bakery manager's position because he prevailed in the 1982–1985 grievance-arbitration proceedings described above.

A vacancy in a bakery manager position at store 877 in Colorado Springs arose in March 1990, when the incumbent bakery manager left the Respondent's employ.

Hansen contacted bakery managers in the Colorado Springs area and asked them to advise him of any candidates they recommended for the job, and asked them to contact the employees in their bakeries to see if they had any recommendations. Joan Kahn, bakery manager at store 828, recommended a former employee named Jerry Owens.[6]

Learning of the vacancy, Richardson also contacted Hansen and expressed his interest in securing it.

Hansen scheduled interviews with both Owens and Richardson at store 877, where he was filling in as bakery manager while seeking a replacement for the departed bakery manager.

At the Owens' interview, Hansen questioned Owens about his background and experience, his familiarity with the necessary bookwork, inventory controls, etc., and his ability to operate a ''scratch'' bakery,[7] including performance of all the tasks required to produce finished products. Owens informed Hansen he left the Respondent's employ because the store at which he was employed was converted from a scratch bakery to a bake-off bakery, and he wasn't happy over the reduction in his job to a simple final baking process. Owens also supplied Hansen with the names of two managers he had worked for, for reference purposes.

At the Richardson interview, Hansen asked Richardson if he felt qualified to undertake the managerial responsibilities of the job and Richardson recited his military background and supervisorial responsibilities he exercised in his military career. Hansen informed Richardson he might encounter some personnel problems at the store and asked Richardson if he could cope with that; Richardson assured him he could. Hansen expressed reservations about Richardson's qualifications for the job, stating he had experienced problems with Richardson. Richardson referred to his earlier grievance-arbitration dispute over his discharge. Hansen disclaimed that was one of problems he was referring to,[8] but nevertheless asked Richardson the reason for the discharge, to which Richardson responded he was discharged for deficient work performance. Shortly before the end of the interview, Hansen commented he doubted he could get Richardson the job, in any event, in view of Richardson's previous actions against the Respondent.[9]

Following the interviews, Hansen contacted the two managers given as references by Owens and Richardson's bakery manager. The managers for whom Owens worked gave him high marks; Richardson's bakery manager was negative.

Hansen felt Owens was the better qualified candidate, contacted his two superiors, and recommended Owens be hired. His recommendation was accepted, Owens was offered the job and accepted. He commenced work the morning of March 21, 1990.[10]

C. *The Alleged February 11, 1991 Unlawful Refusal to Promote Richardson*

The applicable complaint alleges the Respondent violated Section 8(a)(1) and (3) of the Act on or about February 11, 1991, by refusing to accord Richardson normal consideration for promotion to bakery manager at store 877, because he prevailed in the 1982–1985 grievance-arbitration proceedings described above.

The bakery manager position at store 877 again became vacant in December 1990. At that time, the assistant district bakery manager was Pat Campbell,[11] who succeeded Hansen in August 1990, on Hansen's promotion and transfer to another district. Campbell essentially followed the same procedures Hansen employed in seeking a replacement, calling the bakery managers in the district and asking them to advise him of any candidates they could recommend and to contact the employees in their bakeries to see if they had any recommendations. The manager of store 835, Pat Patterson, a bakery with a high sales volume, recommended her second baker, Keith Robinson. Campbell received expressions of interest in the job from Stellick, another cake decorator, and Richardson.

Campbell felt the two cake decorators were unqualified for the job, since the store 877 bakery was a scratch bakery and he expected the bakery manager to manage the bakery and to mix, bake, and glaze or ice bakery products.

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[5] The pertinent complaint alleged, the Respondent's answer thereto admitted, and I find at all relevant times Hansen was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[6] Kahn informed Hansen that Owens was currently working for a competitor of the Respondent's in the area as a bakery manager and was eager to return to the Respondent's employ. (Owens previously was employed by the Respondent as a bakery manager.)

[7] The bakery at store 877 was a ''scratch'' bakery.

[8] Tardiness; reluctant compliance with a Respondent policy against facial hair, requiring a repeated request for compliance therewith; and store 858 bakery manager's complaints that his work was substandard.

[9] Hansen did not have authority to fill the vacancy until he secured the approval of his immediate superior, the district bakery manager, as well as the vice president in charge of the district.

[10] The date of the interviews (as well as what was said) was disputed. Hansen testified both interviews took place on March 20. Richardson testified his interview took place sometime between March 1–15 (explaining he was hazy about dates in stating it took place on April 4 in his pretrial affidavit). Cake Decorator and Local 26 Job Steward Joyce Stellick testified she overheard portions of the Richardson interview while at work on March 14; her testimony is supported by diary entries she made following the interview. I credit her testimony and diary entry concerning the date of the interview. She was an unequivocal and convincing witness. It is unlikely, as Hansen testified, he could interview both men on March 20, check the references received that date, and secure the approval of the hire by the wee hours of the next morning (March 21), when Owens contacted Stellick, informed her he was the new bakery manager at store 877, and requested her early arrival at store 877 for cake decoration.

[11] I find Campbell was a supervisor and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

Campbell was acquainted with Richardson and his work products. Store 858, where Richardson was employed, was undergoing remodeling in November and December 1990. During that time, Campbell spent considerable time at store 858, training Richardson and others in making French bread, donuts, cinnamon rolls, etc. from scratch, because he was dissatisfied with the quality of the baked goods produced there and the low profitability of the bakery operation prior to the remodeling. He observed that although the quality of the bakery products improved for a short period after completion of the remodeling, it soon deteriorated. Two days after the December opening, for example, he removed all the donuts from a showcase on observing their poor quality, learned they had been prepared by Richardson, and had the donuts redone. He also had been receiving complaints from Patrick Hildebrand, store 858's store manager, and Kari Calu, store 858's bakery manager,[12] concerning the poor quality of Richardson's work,[13] which prompted his addressing a memorandum to Hildebrand on January 31, 1991, stating Richardson supposedly was a journeyman baker and, unless his work improved, he should be suspended and possibly discharged. For these reasons, he did not seriously consider Richardson for the bakery manager opening at store 877.

Campbell was not acquainted with Robinson's work. He and the district bakery manager went to store 835, inspected Robinson's work, and found it of high quality. They also questioned Robinson concerning his background and learned he previously managed all aspects of food preparation, including baking, at a first class hotel and was familiar with all aspects of a bakery operation. The two decided to recommend Robinson for the vacancy to the Respondent's regional vice president, and did so. The vice president accepted their recommendation, Robinson was offered the job, and accepted.

There is no evidence Campbell was aware of Richardson's 1982–1985 grievance-arbitration disputes, and Richardson testified he attributed Campbell's failure to offer him the job to probable Hildebrand's and Calu's negative recommendations.

D. *Analysis and Conclusions Concerning the Hansen Statement to Richardson's and Campbell's Refusal to Promote Richardson*

The Supreme Court's decision in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), and the Board's *Meyers II* decision[14] established the principle that an employer's threat of retaliation and/or retaliation against an employee for resorting to the grievance-arbitration provisions of a collective-bargaining agreement over the employer's perceived violation of that agreement constitutes a violation of Section 8(a)(1) and (3) of the Act.

Both prior and subsequent to the issuance of those decisions, the Board and reviewing courts have held an employer's threat to deny promotion to employees as well as the denial thereof, because the employees resorted to the grievance-arbitration provisions of a collective-bargaining agreement between the union representing the employees and their employer over a perceived violation of the agreement, violates Section 8(a)(1) and (3) of the Act;[15] an employer's refusal to afford an employee the opportunity to serve in a higher position because he supported a union organizational campaign violates the same sections of the Act;[16] and an employer's refusal to appoint an employee as a supervisor on out-of-town assignments, as it had in the past, because he engaged in picketing activities during a strike called by the union representing him against the employer, violates the same sections of the Act.[17]

Certainly Hansen's injudicious remark to Richardson on March 14, 1990, to the effect he doubted he could get Richardson the job of bakery manager in view of his successful invocation of the grievance-arbitration provisions of the agreement between Local 26 and the Respondent (were he to recommend Richardson for the job), conveyed to Richardson the message his successful invocation of the agreement provisions would prevent Hansen's securing approval from his superiors to the promotion, in the event he recommended Richardson's promotion to the store 877 bakery manager position. That message constitutes employer discouragement of employee resort to such invocation. (See cases cited above.)

Thus, although the record establishes, and I find and conclude, Hansen chose Owens rather than Richardson for the position because he believed Owens was the better qualified candidate and there is no evidence the Hansen recommendation of Owens for the job nor the approval of his recommendation by his superiors was based either in whole or in part on Richardson's successful invocation of the agreement's grievance-arbitration provisions, I nevertheless find by conveying to Richardson the message recited above, the Respondent violated Section 8(a)(1) of the Act.[18]

With respect to the February 1991 failure to promote Richardson, there is a complete failure of proof by the General Counsel that the Respondent was discriminatorily motivated. It was never established Campbell was aware Richard-

[12] The complaint alleged, the Respondent in its answer thereto admitted, and I find at all pertinent times Hildebrand and Calu were supervisors and agents of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

[13] On December 4, 1990, Hildebrand and Calu gave a written disciplinary warning to Richardson over the poor quality of his work, necessitating their throwing away as unsaleable a quantity of donuts, apple fritters, long johns, and cinnamon rolls improperly mixed and/or baked and/or iced or glazed. On January 11, 1991, Hildebrand and Calu gave Richardson a second written disciplinary warning, over the continued poor quality of his work, during the preceding week, necessitating their throwing away a double batch of chocolate chip cookies (160 dozen), 120 dozen donuts, a double batch of chocolate cakes (216), 15 pounds of hard rolls, and a quantity of cinnamon bread which was stuck to the baking pans, because they were ungreased, a total product value of $601.68.

[14] *Meyers Industries*, 281 NLRB 882 (1987), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Also see *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988).

[15] *Ford Motor Co.*, 266 NLRB 633 (1983).

[16] *Keeler Brass Co.*, 262 NLRB 180 (1982), affd. 719 F.2d 847 (6th Cir. 1983).

[17] *United Exposition Service*, 300 NLRB 211 (1990), enfd. 945 F.2d 1057 (8th Cir. 1991).

[18] I make no findings or conclusions concerning whether the Respondent's failure or refusal to offer the position to Richardson was discriminatorily motivated, inasmuch as the complaint does not so allege and the General Counsel does not so argue. Were I to do so, I would find and conclude the evidence fails to establish the Respondent, by Hansen and his superiors, were discriminatorily motivated in choosing Owens over Richardson.

son successfully processed his grievances through arbitration under the applicable collective-bargaining agreement in 1982–1985, much less that Campbell was motivated by that success when he recommended Robinson over Richardson for the job.

I rather find and conclude that the evidence establishes that Campbell chose Robinson over Richardson, because he believed Robinson was better qualified.

On the basis that the General Counsel failed to meet his burden of proof and the additional ground (under *Wright Line*)[19] that the Respondent affirmatively proved it would not have promoted Richardson to the vacancy irregardless of Richardson's successful prosecution of his 1982–1985 grievances, I shall recommend dismissal of those portions of the complaint alleging by its failure or refusal to offer Richardson a promotion to bakery manager of store 877, in February 1991, the Respondent violated Section 8(a)(1) and (3) of the Act.

E. *The Allegedly Unlawful Disciplinary Actions Against Richardson*

1. The allegedly unlawful April 24 discipline

The applicable complaint alleges the Respondent violated Section 8(a)(1) and (4) of the Act by disciplining Richardson on April 24, 1991, because he filed charges with the Region on April 23, 1990, and February 20, 1991, in Cases 27–CA–11291 and 27–CA–11611, alleging the Respondent violated the Act by Hansen's March 14, 1990 statement and Campbell's failure to promote him in February 1991 and the fact that he gave statements to the Region in support of those charges.

It is undisputed Richardson filed the charges in question in April 1990 and February 1991 and supported them with pretrial affidavits dated April 27 and May 30, 1990, and February 28, May 3, and June 21, 1991 (given to the Region).

a. *Disciplines preceding the April 24 discipline*

Prior to the April 24, 1991 discipline, two written, disciplinary warnings were given to Richardson by Store 858 Manager Patrick Hildebrand and Bakery Manager Kari Calu (on December 4, 1990, and January 11, 1991) and have been described above. Both were issued subsequent to the times Richardson filed his charges with the Region concerning the Hansen statement and Campbell's decision regarding Richardson's promotion.

In both cases, the warnings were issued for producing unsaleable baked goods of substantial value, which had to be discarded as complete losses.

In both cases, photographic evidence established the poor quality of the donuts, cinnamon rolls, long johns, apple fritters, chocolate chip cookies, chocolate cake, hardrolls, and cinnamon bread and provided convincing support to Hildebrand's and Calu's testimony to their unsaleability. Calu's testimony that Richardson was the sole preparer of the items in question was not refuted, and is credited.

Four more written, disciplinary warnings were given to Richardson, including a 1-day suspension, over the poor quality of his work, between the times he filed his charges with the Region over his promotion denials and the issuance of the April 24, 1991 written, disciplinary warning the General Counsel alleges was issued in retaliation for Richardson's filing of the charges.

On February 26, 1991, Hildebrand and Calu gave Richardson a warning for ruining a batch of banana bread (108 loaves) with a retail value of $107 on February 9, 1991; ruining 36 pudding cakes on February 10, 1991, valued at $60; ruining 16 pans of brownies on February 23, 1991, valued at $382 plus a half batch of chocolate chip cookies valued at $118; and ruining 5 pans of cinnamon rolls and a large batch of chocolate chip cookies on February 24, 1991, valued at $237, all of which had to be thrown out as unsaleable.

On March 3, 1991, Hildebrand and Calu, in the presence of Assistant Manager Patty Curry and Local 26 Job Steward Stellick, gave Richardson a warning and a 1-day suspension for his faulty mixing and baking of 100 lemon meringue pies. Sixty-Seven of the pies had to be thrown out as unsaleable and 31 sold at a heavily discounted price.

On March 29, 1991, Hildebrand and Calu gave Richardson a warning for underbaking angel food cakes valued at $119, which had to be thrown out as unsaleable.

On April 22, 1991, Hildebrand and Calu, again in the presence of Curry and Stellick, gave Richardson a warning for taking items from the customer sales area for use in the bakery without following the required procedure of recording the removal.

In all six instances recited above, the testimony of Hildebrand and Calu that Richardson was the baker solely responsible for preparation of the bakery goods in question and Curry's testimony that Richardson removed the items from the sales area without recording the removal was unrefuted, supported by photographic evidence,[20] and is credited.

In apparent concession all six of the written, disciplinary warnings just described were issued for cause, the General Counsel neither in the complaint nor argument contended the six warnings were issued in retaliation for Richardson's filing of his April 1990 and February 1991 charges with the Region over Hansen's statement and Campbell's failure to promote him.[21]

b. *The April 24 discipline*

A written disciplinary warning dated April 22, 1991, was issued by Hildebrand, in the presence of Calu, Assistant Manager Curry, Local 26, and Steward Stellick. The warning stated Richardson was suspended for 3 days for: (1) baking chocolate chip cookies, valued at $194, too hard, rendering them unsaleable, on April 19, 1991; (2) on April 20, 1991, improperly mixing a batch of angel food cake valued at $179, so the cakes were underbaked when placed in the oven, and fell on removal from the oven; (3) again ruining a batch of angel food cake valued at $194 on April 22, 1991; (4) burning 1 pan of cinnamon rolls and improperly mixing batches for 40 bags of chocolate chip cookies on the latter

[19] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved *NLRB v. Transportation Management Corp.*, 462 U.S. 1302 (1984).

[20] Calu's testimony she regularly followed the practice of photographing poor quality baked goods in support of disciplinary warnings of all the bakers was also unrefuted and is credited.

[21] Nor was any evidence introduced either Richardson or Local 26 processed a grievance under the Respondent-Local 26 collective-bargaining agreements over the six disciplines.

date; all of which were unsaleable and had to be thrown away.[22]

Richardson claimed the angel food cake mix was too old and caused the cakes to be unsaleable. Calu and Hildebrand checked the date on the package containing the mix and found the mix was currently useable.

Richard also claimed after he mixed the angel food cake batter, someone else placed the cakes in the oven, and removed them, so he was not responsible for their condition. In his pretrial affidavit, however, he stated he placed the cakes in the oven but did not remove them. Calu testified Richardson mixed the cakes, placed them in the oven, and removed them; she inspected the cakes after their removal, saw they had fallen, and showed them to Hildebrand.

Richardson also denied ruining the chocolate chip cookies, claiming someone else prepared the mix, he simply placed the mix on baking pans, but did not bake them, someone else baked them. Calu testified Richardson mixed the cookies, placed them in the oven, and removed them from the oven; she inspected them and showed them to Hildebrand.

Richardson conceded burning the cinnamon rolls.

It is undisputed the chocolate chip cookies, angel food cakes, and cinnamon rolls were ruined and unsaleable. The only question is whether Richardson was responsible therefor. I find he was; Calu impressed me as an honest, reliable witness, and I credit her testimony.

No evidence was submitted that either Richardson or Local 26 filed or processed a grievance over the April 22, 1991 warning and suspension.

c. *The May 21 discipline*

On May 21, 1991, Hildebrand, in Calu's presence, gave Richardson his eighth written, disciplinary notice for faulty preparation of $179 worth of donuts, which were unsaleable and had to be thrown away.

Again the General Counsel neither in the complaint nor in argument contested that the discipline was for other than cause and there was no evidence Richardson or Local 26 filed and processed a grievance over the discipline.

2. The allegedly unlawful May 23 and 25 and June 1 and 16 disciplines

a. *Background*

The complaint alleges the Respondent violated the Act by issuing a verbal warning to Richardson on May 23, a written, disciplinary warning and suspension on May 25, another written, disciplinary warning on June 1, and a suspension on June 16, 1991, because he filed charges with the Region and support therefor.

About May 20, 1991, Hildebrand attended a meeting with the Respondent's district manager at which the district manager distributed a 20-item checklist of problems he observed in stores within the district, stated he was tired of talking about the items listed, and told the attending store managers to correct the listed items or they risked loss of their jobs.

Item 8. was ''Dress code—total store—time is up!'' The reference was to II of a document distributed to all the Respondent's employees under the title, ''Albertson's Company Personnel Policies.''[23] The section in question read as follows:

> II. DRESS AND APPEARANCE. Albertson's requires their employees to maintain the highest standards of personal cleanliness and grooming. The following specific standards should be observed:
>
> 1. FOR MEN.
>
> . . . .
>
> b. Clean shave. No beards or chin whiskers . . . .
>
> . . . .
>
> g. Shoes shined and in good condition. No sneakers, boots or sandals.

On returning to store 858, Hildebrand conducted a meeting of his department heads. In the course of the meeting, Hildebrand recited the admonitions he received at the district meeting, his threat of dismissal if he did not secure compliance with the 20 items on the checklist, and instructed the department heads to ensure that they and the employees in their departments complied with each item. He also posted copies of the personnel policies adjacent to employee timeclocks in the store.

The dress code previously was posted in the employees' breakroom.

On May 21, 1991, Hildebrand observed Richardson wearing a pair of red, white, and black walking or jogging shoes, with what appeared to be red gills on the sides. He told Richardson that the shoes in question[24] did not comply with the Respondent's dress code. Richardson claimed he was unaware of the policy.[25] Hildebrand insisted that he cease wearing the shoes in question in the future.[26]

Richardson was not scheduled to work on May 22, 1991.

b. *The May 23 discipline*

When he reported for work on May 23, 1991, Richardson wore the L. A. Gear shoes. Seeing the shoes, Hildebrand repeated his earlier statement that the shoes did not conform with the Respondent's dress code. Richardson responded he had shin splints and had to wear the shoes in question.[27] Hildebrand stated if Richardson's feet were that bad, he ought to contact a foot doctor and have the doctor recommend shoes which would conform to the Respondent's dress code. Richardson stated he went through this once be-

[22] During this period, Hildebrand also issued a written, disciplinary warning to Calu over the fact the bakery sales and profitability of store 858 had declined to a level below any other store in the district, due to the high rate of baked goods which had to be thrown away rather than sold.

[23] On November 30, 1984, Richardson signed a copy of the document acknowledging he received and read a copy of the document, understood what it meant, agreed to comply with its terms, and understood his failure to comply was cause for discipline, up to and including discharge.

[24] The shoes were manufactured by L. A. Gear and were air-cushioned.

[25] As noted above, however, Richardson signed a copy of the personnel policies containing the dress code.

[26] Hildebrand issued similar instructions to other employees; they all complied, wearing shoes meeting the code requirements thereafter.

[27] Richardson recently purchased the L. A. Gear shoes; prior to their purchase, he wore black, leather walking shoes, which conformed with the code.

fore with a prior manager.[28] Hildebrand responded he did not care what a prior manager did, he was not going to permit any departures from the Respondent's footwear policy. Richardson ended the conversation with the observation that he would just call in sick.

c. *The May 25 discipline*

When Richardson reported for work on May 25, 1991, he again wore his L. A. Gear shoes. Hildebrand, in the presence of Calu and Stellick, informed Richardson it was the third time he observed Richardson wearing shoes which did not conform to the Respondent's dress code, despite two previous instructions to wear shoes which conformed thereto; that he already warned Richardson twice to cease violating the dress code; and instructed Richardson to clock out and not return to work until he was wearing footgear which complied with the code. Hildebrand also instructed Richardson to shave off his goatee, because this too was a violation of the dress code. Initially Richardson refused to clock out, but did so when Hildebrand informed him he would be discharged for insubordination if he did not.

Richardson was not scheduled to work on May 26 and 27, scheduled to work on May 28, not scheduled to work on May 29, and scheduled to work on May 30 and 31 and June 1, 1991; but neither reported for work nor telephoned the reason for his absence on any of those dates.

On May 30, 1991, Hildebrand telephoned Richardson's home and shop.[29] On each occasion he was advised Richardson was not available and left messages requesting that Richardson telephone him.

On May 31, 1991, Calu's assistant, Jacqueline Johnson, advised Hildebrand she telephoned Richardson's home and shop, reaching him at the latter location, and asked him when he was returning to work; he replied that he was not returning to work unless he was permitted to wear his L. A. Gear shoes, 3 years previously he secured and tendered a doctor's certification that he had to wear such shoes, his wearing of those shoes was approved, and this was in his file; that she checked his file and did not find any such documents therein; and that she requested he secure a current recommendation from his doctor for shoes which would conform to the Respondent's dress code.

Hildebrand called Richardson's shop the same day and talked to Richardson. He asked Richardson if he was coming back to work. Richardson replied he was not coming back unless he could wear his L. A. Gear shoes, stating the store manager 3 years previously permitted him to wear such shoes after he brought in a doctor's certification that he needed to wear such shoes, and that this was in his file. Hildebrand requested he secure shoes which met the Respondent's footwear requirements.

d. *The June 1 threat of discipline*

On June 1, 1991, Hildebrand wrote and mailed a letter to Richardson wherein he stated: (1) Richardson failed to report for scheduled work between May 28 and June 1, 1991; (2) Richardson failed to call in prior to the beginning of his work schedule each of those dates; (3) he telephoned Richardson several times during that period, left messages requesting Richardson to return his calls, but Richardson failed to do so; (4) on May 31, 1991, Richardson informed him he was not going to return to work unless he wore shoes which did not conform to the Respondent's dress code and that 3 years previously he had secured a doctor's certification that he had to wear nonconforming shoes; that previously Richardson had been wearing shoes which conformed to the Respondent's dress code but currently persisted in wearing nonconforming shoes; (5) he was not going to permit the change; (6) he was requesting Richardson to see his doctor and have his doctor recommend shoes which conformed to the Respondent's dress code and to have his doctor telephone him if he had any questions concerning what shoes would comply therewith; and (7) unless Richardson contacted him within 10 days, he would be disciplined.

On June 6, 1991, Richardson telephoned Hildebrand and said he was going to secure shoes which conformed to the Respondent's dress code.

On June 9, 1991, Richardson returned to work wearing black, leather shoes which conformed to the Respondent's dress code, and continued to wear those shoes while at work until June 15, 1991, when he appeared for work again wearing his L. A. Gear shoes.

e. *The June 16 discipline*

On June 15, 1991, Hildebrand, in Calu's presence, gave Richardson a written, warning notice stating for the fourth time Richardson reported for work wearing shoes which did not conform to the Respondent's dress code, despite his receipt of three warnings not to do so and instructed him to cease work and not to return to work until he reported for work wearing shoes which conformed to the Respondent's dress code.

Richardson's next scheduled workday was June 20, 1991, between 2 and 11 a.m. The evening of June 19, 1991, Richardson telephoned Jim Schohn to advise him that he was unable to come to work on June 20 because his foot problem was worse than he and the doctor thought it was and he needed X-rays to determine the extent of the problem. Schohn reported he asked Richardson if he secured from his doctor a medical excuse for not reporting for work, and Richardson stated he had not, but still was not coming in.

Local 26 Job Steward Stellick advised Hildebrand she went to Richardson's donut shop to find out if he was coming to work on June 20, 1991, because she would have to change prior plans if he was not going to work.[30] Stellick stated Richardson said he was not allowed to work as long as he wore his L. A. Gear shoes and he could not work if he couldn't wear them to work or his feet would hurt, so until the question of his wearing those shoes to work was resolved, he could not work at store 858.

Calu went to Richardson's shop about 5:20 a.m. on June 20 and for about 15 minutes observed him working in baker's whites in his shop.

[28] Richardson testified he wore similar shoes in 1988 and when the store manager objected, he secured a doctor's certification that he had to wear the shoes in question due to his shin splints and was permitted to wear them. He testified the certification was on file.

[29] Richardson owned and operated a donut shop in Colorado Springs, in addition to his full-time employment by the Respondent.

[30] Stellick, among other bakery workers, was assigned extra duties due to Richardson's absence.

On June 20, 1991, Richardson telephoned Hildebrand and advised him he was not coming to work for his next scheduled shifts and that the Local 26 business representative had worked it out that he would not have to come to work.

On June 25, 1991, Richardson supplied Hildebrand with a copy of a diagnosis by J. Gregory Stilwell, D.P.M., that he had shin splints, accompanied by a listing of types of walking shoes which would satisfy the Respondent's dress code.

On June 26, 1991, Hildebrand verified with Stilwell the listed shoes satisfied the Respondent's dress code and, on contacting Local 26, heard a denial from Local 26's business representative that he had worked out any arrangement for Richardson to stay off work.

On June 27, 1991, Hildebrand telephoned Richardson's home and shop, was unable to contact him, and left messages for him to call. Richardson returned the call later that day, stated he had secured shoes conforming to the Respondent's dress code, and would return the work his next scheduled workday (July 1, 1991).

On July 1, 1991, Richardson reported for work wearing the same type of black leather shoes he wore prior to his purchase and wearing of the L. A. Gear shoes, and wore those shoes to work thereafter.

f. *Analysis and conclusions regarding the allegedly unlawful Richardson disciplines*

1. The alleged April 24, 1991 violation

Richardson was disciplined eight times subsequent to his filing of his April 1990 and February 1991 charges with the Region over the Hansen statement and the Campbell failure to seriously consider him for promotion. All those disciplines, including two suspensions, were for good cause.

The General Counsel contends in levying one of those disciplines, on April 22, Hildebrand and Calu were motivated by Richardson's filing of his April 1990 and February 1991 charges with the Region.

The General Counsel failed, however, to establish any nexus between the April 22, 1991 discipline and the filing of the charges.

On these facts, I conclude that the General Counsel failed to meet his burden of establishing the April 22, 1991 discipline was levied because Richardson filed and supported the charges in question and therefore shall recommend dismissal of those portions of the complaint so alleging.

2. The alleged May 23 and 25 and June 1 and 16, 1991 violations

The evidence relating to Richardson's discipline on each of the dates just recited demonstrates a battle of wills between an employee determined to wear his favored shoes and a manager just as determined to carry out his superior's order to achieve uniform employee compliance with the Respondent's dress code—and fails to support the General Counsel's theory that Hildebrand insisted on Richardson's compliance, because Richardson filed charges prior to the battle of wills alleging the Respondent by Hildebrand disciplined Richardson because he filed and supported his April 1990 and February 1991 charges.

I therefore shall recommend dismissal of those portions of the complaint so alleging.

g. *The alleged unlawful refusal to recognize and bargain with Local 7*

The applicable complaint alleges the Respondent violated Section 8(a)(1) and (5) of the Act by excluding bakery managers at Colorado stores where its employees are represented by Local 7 from bargaining units at those stores and coverage by contracts between Local 7 and the Respondent governing unit employees' wages, hours, and working conditions; refusing to recognize and bargain with Local 7 concerning the wages, hours, and working conditions of bakery managers; and making changes in the wages, hours, and working conditions of bakery managers without affording Local 7 notice of the changes and an opportunity to bargain with respect thereto prior to implementation.

1. Background

The Respondent and Local 7 executed a succession of collective-bargaining agreements commencing in 1979. The initial (1979) agreement was a multiemployer agreement with two other supermarket chains in the front range area,[31] i.e., King Soopers and Safeway Stores, which expired in 1982.

In the agreement, the Respondent recognized Local 7 as the collective-bargaining representative ''for all employees actively engaged in the handling and selling of merchandise . . . employed by the Employer in the grocery store or stores owned or operated by the Employer in the metropolitan area of Denver, Colorado, but excluding all store managers, office and clerical employees, janitors, meat department employees, demonstrators, watchmen, guards and professional employees and supervisors as defined in the National Labor Relations Act as amended.''

Article 3, section 11 of that agreement stated the minimum wages for the ''indicated classifications'' were set forth in an attached appendix and made a part of section 11.

The attachment listed a classification titled, ''Bakery Department Manager'' and wage rates effective on ''5/6/79, 5/5/80,'' and ''5/4/81.''

Prior to the expiration of that agreement, the Meatcutters International Union merged with the United Food & Commercial Workers International Union and the local meatcutters union merged with Local 7, Local 7 being the surviving organization.

The three grocery chains negotiated separate agreements following the expiration of the 1979–1982 agreement and, by the time they entered negotiations in 1990, the Respondent was negotiating the terms of six separate agreements covering the Respondent's stores within the ''front range.''[32]

During the term of the 1979–1982 agreement, the Respondent operated scratch bakeries within the stores covered by the agreement. Those bakeries employed personnel working in what was termed the rear area, where the mixing, baking, and decoration was performed, and the front or sales area. In some bakeries, the bakery manager was essentially a production baker as well as manager of the entire baking

[31] An area in Colorado which included the cities of Boulder, Bloomfield, Colorado Springs, Denver, Longmont, and Security, Colorado.

[32] The Respondent's agreements with Local 7 covered the Respondent's stores in Colorado in the cities of: (1) Boulder; (2) Bloomfield; (3) Colorado Springs; (4) Denver; (5) Longmont; and (6) Security.

and sales operation and operated from the rear area. In others, the bakery manager was essentially a salesperson as well as manager of the entire baking and sales operation and operated from the front area.

At or prior to the expiration of the 1979–1982 agreement, the Respondent converted a number of the bakery departments to combined bakery/delicatessen departments, others to bake-off bakery departments, and kept some in operation as scratch bakery departments.

The agreements between 1982 and 1988 continued to contain basically the same recognition provision.[33] That provision states,

> The Employer recognizes the Union as the sole collective bargaining representative for all employees actively engaged in the handling and selling of merchandise . . . employed in the grocery store or stores owned or operated by the Employer covered by the Clerks Agreement with the Union on May 1, 1982 and located in the metropolitan area of Denver, Colorado,[34] but excluding all Store Directors, Assistant Store Directors (in stores with average sales volume in excess of $100,000 per week), General Merchandise Directors (in stores with average sales volume in excess of $150,000 per week), Office and Clerical Employees, Scanning Coordinators, Janitors, Meat Department Employees, Bakery Production Employees;[35] Demonstrators, Watchmen, Guards and Professional Employees and Supervisors as defined in the National Labor Relations Act as amended.

The agreements between the Respondent and Local 7 over the 1982–1988 period continued to include the classification of ''Bakery Manager'' in the wage appendix of the respective agreements and wage rates therefor.

Over and prior to the 1982–1988 period, the Respondent recognized Local 26 as the exclusive collective-bargaining representative of employees in front range stores who produced products sold in bakery departments therein, in some cases including employees classified as ''Bakery Manager'' therein.

In 1988 the Respondent, dissatisfied with the operation of both combination deli-bakery departments and bake-off departments in its front range stores, ceased operating the combination departments and began a program to convert all its bakery departments back into scratch bakery departments. Also, in 1988, the Respondent/Local 7 agreements for the period of 1988–1990 ceased to list the classification of ''Bakery Manager'' in the wage provisions of the agreements or provide wage rates therefor.

2. Wages and working conditions of bakery managers in the front range prior to the 1990 negotiations

Prior to the commencement of the 1990 negotiations, the Respondent was making contributions on behalf of bakery managers at 14 stores within the front range into health and pension funds established under the Respondent's agreements with Local 7. At the same time, the Respondent was making contributions on behalf of bakery managers at two stores within the front range into health and pension funds established under the Respondent's agreements with Local 26. Lastly, the Respondent was making contributions on behalf of bakery managers at six stores into funds or plans the Respondent established for managerial employees.

In seniority lists furnished to Local 7 by the Respondent on June 17, 1990, the Respondent listed seniority dates for bakery managers at nine stores within the front range. It was also established prior to the 1990 negotiations the Respondent honored authorizations for an unspecified number of Local 7 dues checkoffs submitted by bakery managers and paid bonuses set forth in Respondent/Local 7 agreements to an unspecified number of bakery managers.

Campbell gave undisputed testimony, which I credit, prior to the 1990 negotiations 15 of the 22 stores in the front range operated scratch bakery departments, 4 were hybrids (partially bake-off operations and partially scratch operations), and 3 were bake-off operations. Campbell's testimony also established bakery managers at 11 of the 15 scratch bakery departments ran their departments from the rear; i.e., they performed production baking, did not engage in much sales within the bakery department, and carried out their managerial functions from the rear or baking areas of their bakery departments; bakery managers at the 4 hybrids, the 3 bake-offs, and 4 scratch bakeries ran their departments from the front; i.e., they concentrated on in sales and carried out their managerial functions from the front or sales areas of their respective bakery departments.

In sum, prior to the 1990 negotiations, bakery managers at 11 (one-half) of the stores within the front range were production bakers and managers and at the other 11 were salespersons and managers.

3. The supervisory issue

One witness testified concerning the duties of bakery managers within the front range stores—Patrick Campbell. Campbell testified the bakery managers at times material:

> 1. Effectively recommended the hire, discipline (including suspension and discharge), transfer, layoff and promotion of all employees in the bakery departments at stores where they were employed, including sales and production employees represented by Local 7 and Local 26 (and covered by their respective agreements).
>
> 2. Assigned and directed the work of all bakery department employees.
>
> 3. Set and changed the work schedules of all bakery department employees.
>
> 4. Secured replacements for all bakery employees who failed to report for scheduled work.
>
> 5. Granted or denied all bakery department employee requests for time off and preferred vacation dates.
>
> 6. Authorized overtime.

I credit that testimony.

Section 2 of the Act defines as a supervisor any individual having authority in the interests of his or her employer to perform any one or more of the following functions: the hire or transfer or suspension or layoff or recall or promotion or discharge or assignment or reward or discipline of other em-

[33] The parties agreed the recognition provision contained in the 1990-1993 agreements is essentially the same as the recognition provision of the agreements between 1982 and 1990.

[34] Each of the six agreements listed a different area, but contained the basic language quoted.

[35] Production bakers, donut fryers, and cake decorators.

ployees; or the adjustment of employee grievances; or the effective recommendation of any of the foregoing—provided the exercise of the function requires independent judgment.

Campbell's description of the duties of the front range bakery managers satisfies that definition, so I find and conclude at pertinent times the Respondent's front range bakery managers were and are supervisors within the meaning of Section 2 of the Act.[36]

In 1989 (according to the testimony of Local 7 Counsel Bowen and Local 7 Business Representative Pantelogow, which I credit), the Respondent took the position bakery managers in the front range were supervisors within the meaning of the Act and the exclusions set out in the recognition provision of the 1988–1990 agreements.

Prior to the 1990 negotiations (according to the testimony of Respondent Counsel Schwarzkopf, which I credit), representatives of the Respondent, Local 7, and Local 26 met and tried to resolve their differences over the representation and contract coverage of bakery managers in the front range and were unsuccessful, but all three refrained from seeking a final disposition of the issue in an impartial forum.

4. The 1990 negotiations

Respondent's counsel Schwarzkopf and Local 7's president, Charles Mercer,[37] conducted the initial negotiations, but were unable to resolve their differences over terms for the 1990–1993 agreements between them covering the employees represented by Local 7 in the front range stores. A representative of the International Union with which Local 7 was affiliated (Hardy)[38] replaced Mercer and struck agreement with Schwarzkopf on tentative terms for the agreements in question.

During the course of the Schwarzkopf/Mercer negotiations, Mercer raised the question of what rate of pay bakery managers were going to receive during the term of the 1990–1993 agreements but failed to get an answer. The question was neither raised nor discussed during the Schwarzkopf/-Hardy negotiations.

There was no discussion concerning any change in or the scope of the recognition provision of the agreements during any of the negotiations preceding tentative agreement, nor was the language of the recognition provision of the 1990–1993 agreements changed from that of the expired agreement.

Following agreement between Hardy and Schwarzkopf concerning the provisions of the tentative agreements, Hardy and Schwarzkopf met with Mercer and one of Mercer's assistants to review the terms of the agreements so Mercer could reduce them to written form. During the review, Mercer renewed the question of what rates of pay the bakery managers were going to receive during the term of the agreements. Schwarzkopf responded that the issue of whether bakery managers were covered by the Respondent/Local 7 agreements was in dispute and the Respondent was adhering to its position they were supervisors not covered by the agreements, but advised Mercer that the Respondent would follow its past practice of paying bakery managers the same rates it agreed to pay all-purpose salesclerks in the agreements, and was agreeable to putting that statement in writing, which he did.

Local 7 Counsel Bowen was assigned by Mercer to prepare a memorandum reciting the terms the parties had agreed on for inclusion in the 1990–1993 agreements. Bowen did so and the parties met to review the memorandum.

On review, Schwarzkopf discovered Bowen listed the classification of bakery manager in the proposed wage appendix setting out the wage rates. He objected, stating the Respondent did not recognize Local 7 as the exclusive collective-bargaining representative of bakery managers nor had the Respondent agreed to their inclusion and coverage under the agreements. Mercer thereupon agreed to strike the listing of the classification and rates from the memorandum and both he and Schwarzkopf initiated the strikeout.

Schwarzkopf did not object to the inclusion on a separate page of the memorandum, under the heading ''Additional Provisions,'' ''III. BAKERY MANAGER INCREASES IN PAY SHALL BE THE SAME AS THE JOURNEYMAN ALL-PURPOSE CLERK.''[39]

Final agreements based on the memorandum were prepared and executed by the parties on June 9, 1990. They did not contain any listing of the bakery manager classification or the rates payable to that classification during the term of the agreements either in the basic documents or the wage appendix, nor were the ''Additional Provisions'' set out in the memorandum, including III, included or added.

5. Wages and working conditions of front range bakery managers subsequent to the execution of the 1990–1993 agreements

Following the execution of the 1990–1993 agreements, the Respondent continued its prior practices described above with respect to contributions to the Local 7, Local 26, and management health and pension funds and plans on behalf of the 22 bakery managers in the front range stores; with respect to listing 9 bakery managers on Local 7 seniority lists; and with respect to checking off and remitting to Local 7 dues of an unspecified number of bakery managers.

6. The bonus payment dispute

Appendix B of the 1990–1993 agreements contains the following provision:

> The Company shall pay the same bonus to its employees as King Soopers pays its employees (at least

[36] The General Counsel alleged and the Respondent conceded Calu, the bakery manager over Robertson, was a supervisor; there was undisputed testimony—Local 26 stipulated to the exclusion of a bakery manager from a unit for purposes of a representation election conducted by the Region; and the General Counsel did not contend bakery managers were employees rather than supervisors as defined in the Act.

[37] I find at times material both were agents of their respective employers within the meaning of Sec. 2 of the Act.

[38] I find at times material Hardy was also also an agent of Local 7 acting on its behalf within the meaning of Sec. 2 of the Act.

[39] The other ''additional provisions'' governed the release from work of negotiating committee members to attend a union contract proposal update meeting; agreement on the date, time, and place the parties would meet to execute final agreement; the effective dates of wage increases; the percentage of the journeyman rates for warehouse employees; the pay increases of red-circled employees; and that the applicable wages for all affected bargaining unit employees were the wage rates set out in the wage appendix.

> twenty cents ($.20) per hour) who are eligible as defined by the King Soopers Agreement.
>
> Additionally, Albertson's will pay an additional fifteen cents ($.15) per hour bonus (payable on all hours paid each fiscal quarter) to those employed throughout the entire quarter and within thirty (30) days of the end of the quarters.

Following the end of the first quarter subsequent to the execution of the 1990–1993 agreements, the Respondent did not pay the bonus described above to its front range bakery managers.

Several bakery managers complained to Local 7 Business Representative Joe DeMers[40] over their failure to receive the bonus in question and DeMers on December 19, 1990, processed a grievance on their behalf. After processing through the grievance-arbitration procedure established under the 1990–1993 agreements, the Respondent's contract administrator, industrial relations department, on February 25, 1991, addressed a letter to DeMers stating:

> We will be paying the bakery managers the same bonus as the clerks on their next regular paycheck without prejudice to our position that the bakery managers are not included in the clerks' bargaining unit.

h. *Analysis and conclusion re the allegedly unlawful refusal to recognize and bargain and allegedly unlawful unilateral change in wages*

The complaint alleged that ''since August 25, 1990,'' the Respondent has violated Section 8(a)(1) and (5) of the Act by: (1) failing and refusing to meet and bargain with Local 7 concerning the wages, hours, and other terms and conditions of employment of the Respondent's employees within the units set out in the recognition provision of the Respondent/Local 7 1990–1993 agreements; (2) unilaterally removing bakery managers from the units described in the recognition provision of the Respondent/Local 7 1990–1993 agreements; and (3) unilaterally changing the wages and other terms and conditions of bakery managers.

The General Counsel failed to specify, either during the hearing or in his posthearing brief, just when, ''since August 25, 1990,'' the Respondent violated the Act by failing and refusing to meet and bargain with Local 7 concerning wages, hours, and other terms and conditions of employment of the Respondent's employees within the units described in the recognition provision of the 1990–1993 agreements, though it is clear he was referring to employees classified as bakery managers. Nor does the General Counsel specify just when, ''since August 25, 1990,'' the Respondent unilaterally removed bakery managers from the units so described. His brief indicates, however, he relies on the Respondent's failure to pay the bonuses specified in Appendix B of the Respondent/Local 7 1990–1993 agreements to bakery managers for the quarter following the execution of those agreements as the unilateral change in wages alleged in the complaint.

I have entered findings that since 1989 the Respondent has taken the position its bakery managers within the front range are supervisors within the meaning of the Act and the exclusionary language of the recognition provision of the Respondent/Local 7 1990–1993 agreements, as well as the preceding agreements (1988–1990). Both Local 7 Counsel Bowen and Local 7 Business Representative Pantelogow conceded this was so,[41] the same position was repeated by Respondent's chief negotiator in the course of the 1990 negotiations, and was again repeated in the February 1991 response of a representative of the Respondent to Local 7's complaint or grievance over the Respondent's failure to pay bonuses to an unspecified number of bakery managers in the front range stores.

I have also entered findings that the bakery managers in the front range stores at times material were supervisors within the meaning of Section 2 of the Act and normal application of the exclusionary language of the Respondent/Local 7 1990–1993 agreements (which would also apply to the 1988–1990 agreements).

An employer is not required to recognize and bargain with a union concerning the wages, hours, and working conditions of statutory supervisors irregardless of those employees' desire for representation and despite a prior practice of recognizing and bargaining with a union the employees have authorized to represent them.[42]

An employer may, however, voluntarily recognize and bargain with a union concerning the wages, hours, and working conditions of statutory supervisors and other employees normally excluded from unit coverage.[43]

In this case, since 1989 the Respondent has consistently taken the position bakery managers in the front range stores are statutory supervisors excluded from the coverage of the 1990–1993 agreements by virtue of the language of the recognition provisions of the several agreements, i.e., ''excluding . . . supervisors as defined in the Act'' and has refused to recognize Local 7 as the exclusive collective-bargaining representative of bakery managers at the 22 stores in the front range.

Over that same period (since 1989), the Respondent has just as consistently avoided a confrontation with Local 7 over the wages, hours, and working conditions of some bakery managers in the front range who maintained membership in Local 7 by continuing to compensate such managers in accordance with applicable provisions of the Respondent/Local 7 agreements.

Noting the Respondent continued to make contributions to the Local 7 health and pension funds on behalf of 14 bakery managers in front range stores, continued to list 9 bakery managers on Local 7 seniority lists, continued to check and remit to Local 7 dues the Respondent was authorized to de-

[40] I find at times material DeMers was an agent of Local 7 acting on its behalf within the meaning of Sec. 2 of the Act.

[41] I find at times material Bowen and Pantelogow were agents of Local 7 acting in its behalf within the meaning of Sec. 2 of the Act.

[42] *McClatchy Newspapers*, 307 NLRB 773 (1992); *MK-Ferguson Co.*, 296 NLRB 776 (1988); *Oakland Press Co.*, 249 NLRB 1081 (1980), enfd. sub nom. *Teamsters Local 372 v. NLRB*, 682 F.2d 116 (6th Cir. 1982), 266 NLRB 107 (1983), enfd. sub nom. *Teamsters Local 372 v. NLRB*, 735 F.2d 969 (6th Cir. 1984), cert. denied 118 LRRM 2968 (1985); *Walla Walla-Union Bulletin*, 239 NLRB 152 (1978), enfd. 631 F.2d 609 (1980).

[43] *Arizona Electric Power Corp.*, 250 NLRB 1132 (1986); *Motor Rim & Wheel Service*, 273 NLRB 866 (1984); *Union Plaza Hotel*, 296 NLRB 918 (1990); *Carolina Telephone Co.*, 258 NLRB 1387 (1981).

duct from an undetermined number of bakery managers, and continued to pay bonuses to an undetermined number of bakery managers, the General Counsel seeks an order requiring the Respondent to recognize and bargain with Local 7 vis-a-vis the 14 bakery managers on whose behalf the Respondent has continued to make contributions to the health and pension funds established under the 1990–1993 (and prior) Respondent/Local 7 agreements and to apply all terms of the 1990–1993 agreements to those 14 bakery managers on the ground the Respondent has failed to take ''proper steps'' to exclude those 14 bakery managers from the coverage of the Respondent/Local 7 1990–1993 (and the 1988–1990) agreements.

The General Counsel cites *Arizona Electric Power* and *Motor Rim*, supra, as authority thereof.

In the former case, the Board held the employer violated the Act by unilaterally withdrawing recognition of a union as the exclusive bargaining representation of a supervisor (head load dispatcher), denying his coverage under the terms of the agreement during the term of the current agreement and his coverage thereunder. The Board held, in essence, because the employer voluntarily recognized the union as the exclusive collective-bargaining representative of the supervisor and agreed to his inclusion and coverage under the current agreement, it was not privileged to withdraw that recognition and coverage during the term of the agreement (though conceding it could do so at the end of the term of the agreement and thereafter, by taking the complained-of actions by timely notice prior to the execution of a subsequent agreement; likening the situation to a unilateral attempt to change the scope of a bargaining unit certified by the Board following Board certification of the unit composition).

In the latter case, the Board held the employer violated the Act by unilaterally removing an employee in a classification normally excluded from employee units considered appropriate by the Board (a confidential secretary) from the bargaining unit set forth in the recognition provision of an agreement with a union, withdrawing recognition of the union as her bargaining representative, and denying her coverage under the terms of the agreement, again during the term of the agreement and coverage thereunder. Again the Board followed the principle once an employer voluntarily recognizes a union as the exclusive collective-bargaining representative of an employee within a classification normally excluded from unit coverage under the Act whose wages, hours, and working conditions are articulated in a current agreement, the employer may not withdraw that recognition and coverage unless and until the employer does so by appropriate notice prior to the execution of a subsequent agreement.

Both *Union Plaza* and *Carolina Telephone*, supra, were decided on similar grounds.

In this case, however, the Respondent took the unequivocal position bakery managers were supervisors within the meaning of the Act and the language of the respective recognition provisions of the 1990–1993 agreements; that the Respondent did not recognize Local 7 as their exclusive collective-bargaining representative; and that the bakery managers' wages, hours, and working conditions were not going to be covered by the 1900–1993 agreements prior to the execution of the 1990–1993 agreements and implemented that position by securing the strikeout of the listing of the classification of bakery manager in the wage supplement to those agreements and the elimination of any reference to the bakery manager classification or rates therefor in the executed agreements, and with no change in the exclusionary language of the agreements.

On these facts, the doctrine exemplified by the four cases discussed above appears inapplicable.

There are other difficulties with the General Counsel's position.

Why should the Respondent be ordered to recognize and bargain with Local 7 concerning the wages, hours, and working conditions of 14 bakery managers within the front range stores, and to apply the terms of the 1990–1993 agreements only to those 14? Why not to bakery managers at the 11 stores where bakery managers run the departments from the front or sales end of their departments? Or why not to the nine bakery managers listed in the seniority lists supplied to Local 7 by the Respondent in 1991? Or why not to the undetermined number of bakery managers whose dues payments to Local 7 are being checked off from their pay by the Respondent and remitted to Local 7? Or why not to bakery managers at the stores where the bakery sales department employees are represented by Local 7, the Respondent recognizes Local 7 as the sales employees exclusive collective-bargaining representative, and the sales employees are covered by the 1990–1993 Respondent/Local 7 agreements?

These questions illustrate the fact the General Counsel's theory of the case is untenable. His theory requires a finding in the 1990 negotiations the Respondent voluntarily recognized Local 7 as the exclusive collective-bargaining representative of 14 of the 22 bakery managers in the front range stores covered by the 1990–1993 agreements, despite the exclusion therefrom of the classification of ''Supervisors as defined in the National Labor Relations Act as amended'' and the participation of 2 bakery managers in Local 26 health and pension plans and of 6 bakery managers in manager plans.

To the contrary, the Respondent refused to recognize Local 7 in those negotiations as the representative of any bakery managers employed at any front range stores where Local 7 represents employees and has been recognized by the Respondent as the exclusive collective-bargaining representative of employees and to incorporate in its agreements with Local 7 only provisions covering the wage classifications set out in the wage appendices of those agreements.

It is undisputed the Respondent initially failed or refused to pay the bonuses set out in Appendix B of the 1990–1993 agreements to an unspecified number of bakery managers in the front range stores (though later it did so to a still unspecified number, avoiding a confrontation with Local 7 over which, if any, bakery managers were entitled thereto), but again preserved its position it did not recognize Local 7 as their representative or concede their coverage under the 1990–1993 agreements.

I find and conclude that, on the basis of the above, at all pertinent times the front range bakery managers were supervisors within the meaning of the Act and the exclusionary language of the 1990–1993 Respondent/Local 7 agreements; the Respondent at no time since 1989 has wavered from the correct position the front range bakery managers were supervisors within the meaning of the Act and excluded from the coverage of the 1990–1993 agreements by the exclusionary

language thereof; and that the Respondent did not violate the Act by refusing to include bakery managers within the unit description of the recognition provision of the 1990–1993 agreements, refusing to recognize and bargain with Local 7 concerning the wages, hours, and working conditions of those bakery managers, and refusing to apply the wage, hours, and working condition provisions of the 1990–1993 agreements between Local 7 and the Respondent to bakery managers.

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and both Local 7 and Local 26 were labor organizations within the meaning of Section 2 of the Act.

2. At all pertinent times Hansen, Campbell, Hildebrand, Calu, and Karen Freckleton (contract administrator) were supervisors and agents of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

3. At all pertinent times Hardy, Mercer, Bowen, DeMers, and Pantelogow were agents of Local 7 acting on its behalf within the meaning of Section 2 of the Act.

4. The Respondent violated Section 8(a)(1) of the Act in March 1990 by telling Richardson he doubted he could get Richardson the job of bakery manager because of his successful invocation of the grievance-arbitration provisions of the Respondent/Local 26 agreement.

5. The Respondent did not otherwise violate the Act.

6. The unfair labor practice set out above affected and affects interstate commerce as defined in the Act.

THE REMEDY

Having found the Respondent engaged in an unfair labor practice, I recommend the Respondent be directed to cease and desist therefrom and to take affirmative actions designed to effectuate the purposes of the Act.

Having found the Respondent violated the Act by the conduct described above, I recommend the Respondent be directed to address a letter to Richardson stating his successful invocation of the grievance-arbitration provisions of the Respondent/Local 26 agreement does not and will not affect his promotional opportunities and to post a notice to employees covered by agreements between the Respondent and Local 26 stating the promotional opportunities of employees covered by those agreements are not and will not be affected by their resort to the grievance-arbitration provisions of agreements between Local 26 and the Respondent to resolve grievances over the Respondent's application and administration of those agreements.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[44]

ORDER

The Respondent, Albertson's, Incorporated, Colorado Springs, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from telling Robert Richardson or any other employee his or their promotional opportunities have or will be affected by his or their resort to the grievance-arbitration provisions of agreements between Local 26 of the Bakery, Confectionery and Tobacco Workers Union to resolve grievances over the application or administration of those agreements.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Advise Robert Richardson in writing that his successful invocation of the grievance-arbitration provisions of an agreement between Local 26 and Albertson's, Incorporated has not and will not affect his promotional opportunities.

(b) The employment opportunities of Albertson's employees covered by agreements between Local 26 and Albertson's have not and will not be affected by their resort to the grievance-arbitration provisions of those agreements to resolve grievances over Albertson's application or administration of those agreements.

(c) Post at its facilities in Colorado where employees represented by Local 26 are employed and covered by agreements between Albertson's and Local 26, copies of the attached notice marked ''Appendix B.''[45] Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order, what steps have been taken to comply.

[44] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A [Side 1 - G.C. Exh. 5.]

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
SETTLEMENT AGREEMENT

In the Matter of ALBERTON'S, INCORPORATED
Case 27–CA–11825

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director of the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE—Upon approval of this Agreement, the Charged Party will post immediately in conspicuous places in and about its plant/office, including all places where notices to employees/members are customarily posted, and maintain for 60 consecutive days from the date of posting, copies of the attached Notice made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In

the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting.

COMPLIANCE WITH NOTICE—The Charged Party will comply with all the terms and provisions of said Notice.

BACKPAY—The Charged Party will make whole the employees named below by payment to each of them of the amount opposite each name. Oren Spark - $100.00

This settlement agreement is limited to the allegations in the above-captioned charge, and the parties agree that it does not create a settlement-bar defense to any other charges or violations involving the Charged Party. Evidence of the alleged violations resolved by this agreement may be used as background evidence in any other Board proceedings.

The entry into this Agreement by the Charged Party shall not constitute an admission of any unfair labor practice.

The Charged Party agreed to promote Oren Sparks to the first cutter position at Albertson's Store No. 874, effective *the week ending 9–28–91*.

REFUSAL TO ISSUE COMPLAINT—Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or if the Charging Party does not enter into this Agreement, performance shall commence immediately upon receipt by the Charged Party of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE—the undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the Regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in this case.

Charged Party *Albertson's, Incorporated*		Charged Party *Oren Sparks, An Individual*	
By: Name & Title /s/ Michael B. Schwarzkopf	Date 9/18/91	By: Name & Title /s/ Oren Waldo Sparks	Date 9/19/91
Recommended By: /s/ Michael J. Belo, General Counsel	Date 9/16/91	Approved By: /s/ George Christensen ALJ	Date 9/20/91

APPENDIX A [Side 2 - G.C. Exh. 5.]

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives all employees the following rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

In recognition of these rights:

WE WILL NOT tell employees that they will not be promoted because of their union activity.

WE WILL promote employees regardless of Union activity. Oren Sparks' performance merits a promotion to first cutter.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

ALBERTSON'S, INCORPORATED

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board found we violated the National Labor Relations Act and ordered us to post and abide by this notice. You are therefore advised:

WE WILL NOT tell employees their promotional opportunities will be affected by their resort to the grievance-arbitration provisions of our agreements with Local 26 of the Bakery, Confectionery and Tobacco Workers Union to resolve grievances over our application or administration of the terms of those agreements.

WE WILL NOT limit the promotional opportunities of employees who resort to the grievance-arbitration provisions of the above agreements to resolve grievances over our application or administration of those agreements.

WE WILL advise Robert Richardson in writing that his promotional opportunities will not be affected by his past or future resort to the grievance-arbitration provisions of our agreement with Local 26.

ALBERTSON'S, INCORPORATED